ever it arose, and should be submitted to arbitration if they then determined that it belonged to the prescribed class. The final decision to arbitrate or not to arbitrate would depend upon the view of the President and Senate, after the controversy had arisen.

The method of determining whether a dispute is justiciable is alike in its application to each of the contracting parties, and is entirely just and equitable. A question can be submitted to arbitration only if all or five of the six commissioners decide that it is within the definition of the treaty. Such a decision cannot be made without the concurrence of two of the three citizens of either country, who are appointed to represent it, and all of the representatives of the other country. Under these conditions it is inconceivable that there would ever be arbitration of a difference that ought not to be arbitrated.

In the report of the majority of the Committee on Foreign Relations, except on the constitutional grounds above discussed, there is not an objection to the treaties, or a suggestion of amendment of either of them, that could not be made with equal reason and as great force by the representatives of the other contracting party. But these representatives of Great Britain and France have discovered no danger to either party in the provision objected to, and have signed the treaties as they are. It seems to me that, at a time when the leading nations of the world desire the adoption of measures for the preservation of peace, and when a very large majority of the people of the United States are earnest in their desire that the United States should be a leader in this movement, it would be most unfortunate if the Senate should refuse to ratify these treaties, through fear that all, or five out of six, of the members of the Joint High Commission might make a mistake in deciding that a certain difference was justiciable.

I think it would be equally unfortunate if the Constitution should be so interpreted as to render it impossible for the United States ever to make a binding treaty to submit to arbitration future controversies of a certain class, except on condition that the treaty-making representatives of the Government, upon consideration of the controversy after it has arisen, should then decide to submit it to arbitration, as within the terms of the previous agreement.

The Constitutional Objection to the New Arbitration Treaties.

By Simeon E. Baldwin, LL. D., Governor of Connecticut, Ex-Chief Justice of Connecticut, Ex-President of the American Bar Association.

From the Independent of August 31.

The issue between the Senate Committee on Foreign Relations and the President as to the constitutionality of the pending arbitration treaties is a very narrow one. It may be stated thus: Can the Senate agree in advance to abide by the decision of some outside authority, as to whether a particular claim is justiciable in its nature?

It is unfortunate that no better word than "justiciable" (which the printers generally insist on making "justifiable") could be found to express the idea of the parties to the treaty. Few people understand its meaning without a lengthy explanation, and any explanation leads toward the borders of obscurity. The treaty tells us that one reason for holding a claim justiciable may be that its validity can be decided by applying the principles of law or equity. But what is equity, as distinguished from law?

Here, again, is a call for definitions. Does "equity" mean that branch of remedial jurisprudence which, by the old law of England, was kept distinct from what pertained to legal remedies? Certainly it cannot, in the French treaty, be intended that "équité" should be thus understood. France, and the world generally, know "equity" as that which is fair and just, though perhaps not sanctioned or required by strict and technical rules of ordinary law. It is the *jus æqui et boni* of Roman law.

But few long documents have ever been framed in which words are not so used as to give rise to some controversy as to their precise meaning in that particular connection. A large part of the time of courts, in all countries, is taken up with determining the true construction of written papers.

It may well be anticipated that controversies will arise under these treaties as to the classes of cases which are "justiciable in their nature." How, then, should they be decided? In the natural course of things, such a dispute would be referred to some designated tribunal for its decision. The President and Senate could certainly agree to this, after the dispute had begun. Why should they not agree to it before the dispute arises?

It is not delegating, but rather exercising, their treaty-making powers.

The Supreme Court of the United States, in 1892, made these observations, as to quite analogous action by Congress:

"It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit."*

Nearly forty years ago an Act of Congress was passed, and is still in force (U. S. Revised Stat., §398), providing that

"the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries."

Here the Senate, the House of Representatives, and the President concur in giving a full warrant to a Cabinet officer to conclude any treaty or convention on an important subject on obtaining the further consent of the President, but without obtaining the further consent of the Senate. Numerous and beneficial conventions with foreign powers rest on the foundation of this statute.

So Congress has given the President power to decide whether the legislation of a foreign country is such as

* Fong Yue Ting *v.* United States, 149 United States Reports, 649, 714.

fairly brings it within the scope of a reciprocity tariff act or a treaty of reciprocity.

The Supreme Court of the United States has said, in a leading case, with regard to a statute of this character, that the President's making such a decision was not legislation, nor an exercise of the treaty-making powers, but that he was acting as "the mere agent of the law-making department, to ascertain and declare the event upon which its expressed will was to take effect."*

So here, the treaty, if ratified by the Senate, would indeed authorize the Joint High Commission of Inquiry, by a decision that was unanimous or nearly so, to determine absolutely whether a certain claim was or was not justiciable; but the discharge of the function by them would be simply the execution of an authority to see that the treaty is carried out, according to its true intent and meaning. The distinction is between, on the one hand, a power to make—or join in making—the law (which necessarily calls for the exercise of discretion, and a choice between different policies), and, on the other hand, acting under and pursuant to the law—that is, carrying out an authority conferred by the law-making power in order to secure the proper execution of the law.

The door to the negotiation of treaties of this class was opened wide by Congress in 1890, by a concurrent resolution requesting the President

"to invite from time to time, as fit occasions may arise, negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two governments which cannot be adjusted by diplomatic agency may be referred to arbitration, and be peaceably adjusted by such means."

It seems ungracious for the Senate, after uniting in this overture to the world, to insist on so rigid a doctrine as to the delegation of the treaty-making power. At bottom, it is the not unnatural outgrowth of the fact that the Senate, under our constitutional system, stands for the several States, and is really a diet of deputies from different political sovereignties, meeting on a footing of equality.

It was given this position to make sure the rights of these States respectively, as against any exercise of the powers of the United States as a whole. It was not given it to reduce the treaty-making power of the United States by forbidding them either to agree in advance to what they would do in a certain event, or to agree in advance to make the decision of some independent tribunal in effect their decision in determining whether that event had occurred.

HARTFORD, CONN.

The regular Peace Sunday, observed now more or less for twenty years, comes this year on the 17th of December, the third Sunday in the month. It is observed not only in this country, but even more generally in the churches of England and to some extent in European continental countries. Do not confuse this day, which is the General Peace Sunday for all the countries of the world, with any special peace Sunday which may have been announced by single societies for special occasions.

*Field *v.* Clark, 143 United States Reports, 649, 692-694.

The Peace Treaties.

By John B. Moore, LL.D., Professor of International Law in Columbia University.

From the Independent.

The framers of the peace pacts concluded with France and Great Britain on the third of the present month (August) are to be congratulated on a notable achievement. Negotiated at the same time and being substantially identical in terms, these treaties, which now await the approval of the United States Senate, represent, although they originated with the Government of the United States, the result of the combined and deliberate judgment of the three great powers in whose names they were signed, and bear upon their face the marks of a wise and sagacious statesmanship. They may on the one hand cause a certain disappointment because they do not profess more, and they may, on the other hand, arouse a certain antagonism because they do not attempt less; but, to the great mass of thoughtful persons, whose minds are not prepossessed either by hope or by distrust, it is believed that an examination of their provisions will carry the conviction that they are judicious and practical measures, well adapted to the attainment of the resolve declared in their preamble, namely, that "no future difference shall be a cause of hostilities" between the contracting parties "or interrupt their good relations."

Let us consider, in the first place, the occasion and significance of the pending treaties. There exist at the present time between the contracting parties certain general treaties, concluded several years ago, by which it was agreed to refer to arbitration differences of a "legal nature, or relating to the interpretation of treaties," provided that they did not "affect" the "vital interests, the independence, or the honor" of the contracting powers, or "concern the interests of third parties." It is not my desire to figure as a critic of the treaties of which this clause contains the substance. Although they tended, in my opinion, to impair the force of the Hague convention, I recognize the fact that they were advocated and made by men whose abilities and motives command the highest respect, and that they were carried through, not upon the supposition that they were of great intrinsic legal value or by any means to be regarded as final, but apparently upon the theory that the cause of arbitration would be advanced, especially among nations not supposed to be well inclined toward it, by the multiplication of arbitral agreements. Nevertheless, it is obvious that the comprehensive words in the clause above quoted are those of exclusion. The general who, on placing his troops in position, directed their thoughts to retreat by pointing out a way of escape, ought not to have been surprised when, as history tells us, they promptly took it. To the operation of all laws it is admitted that there are certain general exceptions, but it is not usual to devote the text of statutes to the enumeration of them. Even arbitral awards, no matter how absolute may be the terms of the submission, are, as publicists well know, open to attack on the ground of nullity if they violate certain fundamental principles of law or of procedure; but it is not the custom of nations to anticipate in their arbitral agreements the infraction of those principles. But, an even more serious objection